No. 89-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., NATIONAL ASSOCIATION OF CASUALTY AND SURETY AGENTS, NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS, NEW YORK STATE ASSOCIATION OF LIFE UNDERWRITERS, INDEPENDENT INSURANCE AGENTS OF NEW YORK, INC., AND THE PROFESSIONAL INSURANCE AGENTS OF NEW YORK, INC.,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

MERCHANTS NATIONAL CORPORATION,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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July 24, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Second Circuit correctly decided that the Federal Reserve Board permissibly interpreted section 4 of the Bank Holding Company Act of 1956, as amended, when it concluded that that section does *not* preempt state law governing bank operations and therefore does not subject state-chartered banks that are controlled by bank holding companies to the Act's restrictions on insurance activities.

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BRIEF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Conference of State Bank Supervisors ("CSBS") submits this brief as *amicus curiae* in support of Respondent, the Board of Governors of the Federal Reserve Sys-

tem (the "Board"), and in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. CSBS is the professional association of state government officials responsible for chartering and regulating more than 10,000 state-chartered banking institutions in the 50 states and in Guam, Puerto Rico and the Virgin Islands.

CSBS has a vital interest in this case because Petitioners' argument raises a serious threat of preemption of state banking laws.[1] Currently, the laws of fourteen states authorize state-chartered banks to engage, either directly or indirectly through subsidiaries, in insurance activities not permitted to bank holding companies by section 4(c)(8), 12 U.S.C. § 1843(c)(8), of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841, *et seq.* ("BHC Act").[2] Petitioners assert that the Board must apply the restrictions on insurance activities of section 4(c)(8) to all holding company-owned state-chartered banks *regardless* of state law.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

Petitioners make no effort to show that this case is worthy of review by the Supreme Court by demonstrating either that this case involves a conflict among the decisions of the United States courts of appeals or that the case is of national importance. Moreover, Petitioners' arguments that the Second Circuit incorrectly decided the case are without merit.

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[1] CSBS frequently appears before the courts to resist unauthorized efforts to preempt state banking laws and to help preserve the deference to state law which Congress has consistently mandated in banking.

[2] *See* The Conference of State Bank Supervisors, *State of the State Banking System* 10 (1989) (reproduced at Appendix I).

This case involves the reaffirmation by the Second Circuit of the long-standing supervisory role of the primary bank regulators—the Comptroller of the Currency (for national banks) or the states (for state-chartered banks) —over bank subsidiaries of bank holding companies. The Board's responsibilities under the BHC Act are properly confined to the complementary role of regulating the activities of bank holding companies and their *nonbanking* subsidiaries.

Petitioners' alarmist argument that the Second Circuit's opinion changes an established interpretation of the law and threatens to create a savings and loan industry-type crisis is unfounded. To the contrary, it has long been the practice of state bank chartering authorities to authorize state-chartered banks to engage in nonbanking activities. Such activities are freely authorized because they are not restricted by the BHC Act.[3] Consequently, it is the Petitioners who would create chaos in the banking industry by suddenly rendering widespread, existing practices of state-chartered banks illegal.

There is, moreover, no justification for Petitioners' argument that the problems in the savings and loan industry are a harbinger of what expanded powers would mean for state-chartered banks. History demonstrates that, notwithstanding their expanded powers relative to national banks, the rate of failure for state-chartered banks is lower than that for national banks.[4]

Petitioners also contend that the Second Circuit misapplied the test for judicial review of agency interpretation of their generic statutes as articulated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). They argue

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[3] *See id.*

[4] *See id.* at 8 (reproduced at Appendix II).

that without reviewing the statutory language and congressional intent, the court "hastily" moved to the second step of the *Chevron* analysis and pronounced the Board's interpretation to be "permissible." Petitioners would impose upon reviewing courts a structural rigidity of opinion writing that *Chevron* does not require; a reviewing court is not required to disembody its analysis of Congressional intent from the agency's analysis of that intent.

It is also clear from the court's opinion that it did not regard the evidence of Congressional intent as being favorable to Petitioners. After a lengthy review of the language of section 4, the language and structure of other related provisions of the BHC Act, the legislative history of the Act, subsequent legislation, and related case law, the Second Circuit concluded that the Board's position was correct. Under these circumstances, the mode of analysis employed by the Court of Appeals does not raise "principles the settlement of which is of importance to the public as distinguished from that of the parties," and so is not worthy of Supreme Court review.[5]

II. THE SECOND CIRCUIT WAS CORRECT IN DEFERRING TO THE BOARD'S INTERPRETATION OF THE BHC ACT

In its review, the Second Circuit properly deferred to the Board's interpretation of the BHC Act. The Board had merely reaffirmed its long-standing interpretation of the BHC Act. Where, as here, that interpretation is within the agency's particular expertise, it is entitled to great deference.[6]

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[5] *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923)). *See also Magum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

[6] *See Board of Governors v. Investment Co. Inst.*, 450 U.S. 46, 56 (1981).

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court articulated a two-step analysis for judicial review of an agency's construction of the statute which it administers: first, to determine "whether Congress has directly spoken to the precise question at issue"; and second, if Congress has not directly addressed the question at issue, to determine whether the agency's answer is based on a "permissible construction of the statute." [7]

In applying the first step of the *Chevron* analysis, the Second Circuit concluded that the provisions of the BHC Act did not "reveal an unambiguous congressional intent concerning the precise question at issue." [8] Then, in conjunction with an analysis of other indicia of Congressional intent, the court simultaneously proceeded with the second step of the *Chevron* analysis and concluded, after examining the statutory language using traditional principles of statutory construction and examining the legislative policy and history, that the Board's interpretation was reasonable.

That is exactly what this Court did in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), where a unanimous Court began its statutory analysis by referring to the deference to be given to the agency's interpretation:

> An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). Accordingly, our review is limited to the question whether it is reasonable, in light of the language,

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[7] 467 U.S. at 842-43. Of course, if the Congressional intent is clear, the reviewing court must give effect to that intent. *Id.*

[8] Pet. App. 11a.

> policies, and legislative history of the [statute] for the Corps [of Engineers] to exercise jurisdiction over [certain] wetlands.[9]

The Second Circuit thus applied the *Chevron* analysis in precisely the manner applied by a unanimous opinion of this Court, first noting that the language of the statute, by itself, was insufficient to answer the question at issue, and then analyzing the legislative history and underlying policy of the statute in the course of reviewing the reasonableness of the agency's interpretation of the statute.[10]

Further, the preemption of state law urged by Petitioners is an extreme remedy and may not be undertaken unless clearly intended by Congress: "It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so."[11] The presumption against preemption of state law, absent a clear statement of Congressional intent, is especially strong when, as in this case, there has been a long-standing history of state regulation.[12]

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[9] 474 U.S. at 131.

[10] *Id.* at 131-35.

[11] *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952). *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulaiton is not favored" quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

[12] *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 86 (1987) (where there is a long-standing prevalence of state regulation, Congress "would have said so explicitly" if it intended to preempt state law); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (where the federal government enters a field where there is a long-standing history of state regulation, there is a presumption that the "powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

III. THE SECOND CIRCUIT'S DECISION CORRECTLY ALLOWS THE NATIONAL AND STATE BANK REGULATORS TO REGULATE THE NONBANKING ACTIVITIES OF BANKS OWNED BY BANK HOLDING COMPANIES

For over a century, the central feature of bank regulation in the United States has been a dual banking system composed of national banks chartered by the Comptroller and state banks chartered by the states.[13] The several federal banking statutes create a comprehensive regulatory scheme in which state and federal banking agencies have well-defined and complementary roles. National and state-chartered banks, as permitted by their primary regulators, engage in various banking-related activities.[14] The question of whether those activities also are permissible for bank holding companies or their nonbank subsidiaries is unrelated and cannot affect the operating authority of state-chartered banks.

In enacting the BHC Act, Congress expressly confined the Board's regulatory authority to bank holding companies and, with respect to their subsidiaries, to only their previously unregulated *nonbanking* subsidiaries.[15] Section 4 of the BHC Act unequivocally excludes a bank

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[13] S. Rep. No. 1095, 84th Cong., 2d Sess., pt. 2, at 5 (1956). *See also Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 172-73, 177-78 (1985) (BHC Act was intended "to retain local, community-based control over banking").

[14] *See, e.g.*, 12 C.F.R. §§ 5.34, 7.7430 & 7.7490 (regarding activities permitted of national banks by the Comptroller); The Conference of State Bank Supervisors, *A Profile of State Chartered Banking* 180-182 (12th ed. 1988) (lists of activities permitted of state-chartered banks by the states).

[15] *See Cameron Fin. Corp. v. Board of Governors*, 497 F.2d 841, 845 (4th Cir. 1974); H.R. Rep. No. 609, 94th Cong., 1st Sess., 1-6 (1955); *Control and Regulation of Banking Holding Companies: Hearings on H.R. 2674 Before the Committee on Banking and Currency of the House of Representatives*, 84th Cong., 1st Sess. 13-14 (1955) [hereinafter cited as "*1955 House Hearings*"].

holding company's *banking* subsidiaries from regulation by the Board.[16] Moreover, this Court clearly has stated that section 4 does not empower the Board to regulate banks.[17]

The plain language of the BHC Act supports the Second Circuit's conclusion that section 4 does not apply to holding company-owned state banks. Section 4(a) prohibits (with certain specific exceptions) a bank holding company from acquiring or retaining ownership or control of any company "which is not a bank."[18] It is only companies that are *not* "banks" under the BHC Act that must limit their activities to those permitted by section 4(c)(8) in order to be acquired or retained by a bank holding company.

Petitioners argue that the prohibitions of section 4(c)(8) apply to *both* banking and nonbanking subsidiaries of a bank holding company. However, the language of section 4(c)(8) does not support this assertion. The introduction to subsection 4(c)(8) stating that "[t]he prohibitions in this section shall not apply . . ." makes clear that it only establishes exceptions to the general prohibitions of section 4(a). Moreover, section 4(c)(8) does not affirmatively extend the Board's jurisdiction to matters not already within the scope of section 4(a)(2). The express language of sections 4(a)(1) and 4(a)(2) forbids "*bank holding companies*"—not "banks"—from engaging in specified activities.

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[16] From the title of section 4—"INTERESTS IN NONBANKING ORGANIZATIONS"—to its specific language, every applicable provision of the BHC Act makes clear that section 4 does not govern banks.

[17] *Board of Governors v. Investment Co. Inst.*, 450 U.S. 46, 59 n.25 (1981). *See Cameron Fin. Corp. v. Board of Governors*, 497 F.2d at 848. *See also Patagonia Corp. v. Board of Governors*, 517 F.2d 803, 810-11 n.10 (9th Cir. 1975).

[18] 12 U.S.C. § 1843(a).

Petitioners contend that because section 4(c)(8) uses the words "subsidiary" and "company" and those words are defined to include banks, the restrictions of section 4(c)(8) must apply to banks. However, by *expressly excluding banks* in section 4(a), Congress indicated its intent that the term "company" as used in section 4 does not include banks. Further, the definition of "subsidiary" in section 2 was the result of a 1966 amendment to the BHC Act. As such, it sheds no light on what was intended by the Act's original language.[19]

The legislative history of the BHC Act supports the Second Circuit's conclusion that section 4 does not reach the activities of banks owned by holding companies. In enacting the original BHC Act of 1956 Congress did not indicate that the Act was intended to affect the activities of holding company-owned banks, whose powers have traditionally been regulated by their chartering authorities. Representative Spence, the Chairman of the House Committee on Banking and Currency and the chief sponsor of the House bill, specifically noted that the bill would not affect the powers granted to state banks under state law.[20] Moreover, Federal Reserve Board Governor Robertson testified that entities that were "merely an arm of the bank itself" would not be subject to the nonbanking prohibitions of the BHC Act.[21]

The legislative history of the 1970 amendments to section 4(c)(8) further clarified that section 4 does not reach the activities of banks owned by holding companies.[22] Moreover, in enacting Title VI of the Garn-

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[19] *See* 12 U.S.C. §§ 1841(d) & (g), *as amended by* Act of July 1, 1966, Pub. L. No. 89-485, §§ 4-6, 80 Stat. 236-37.

[20] *1955 House Hearings, supra* note 15, at 553.

[21] *See id.* at 119.

[22] *See* H.R. Rep. No. 387, 91st Cong., 1st Sess. 15 (1969) (prevailing views of the majority).

St Germain Depository Institutions Act of 1982,[23] Congress did not amend section 4(a) of the Act. Yet, as previously explained, section 4(a) is the critical provision because it contains the only relevant nonbanking prohibitions.

The Board consistently has ruled that activities conducted by holding company-owned state-chartered banks in accordance with state law are excluded from section 4. For example, in 1964 the Board declared that "the laws of the State in which [a holding company-owned state] bank operates . . . govern the right of the bank to provide a particular service."[24] Petitioners overemphasize the importance of *Citicorp* (American State Bank), 71 Fed. Res. Bull. 789 (1985), the only case where the Board asserted jurisdiction over the direct operations of a holding company-owned bank. The Board did so, however, only to prevent the use of the bank as a "device" to "evade" the restrictions on insurance activities under section 4(c)(8). The Board's decision was based upon its authority to "prevent evasions" of the BHC Act under section 5(b).[25] The Board stressed that it was not deciding the general question of whether section 4 applies to the activities of holding company-owned banks.[26]

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[23] Act of Oct. 15, 1982, Pub. L. No. 97-320, § 601, 96 Stat. 1536 (amending 12 U.S.C. § 1843(c)(8)).

[24] 12 C.F.R. § 225.118(c) (adopted 1964; redesignated 1971). *See also NCNB Corp.*, 72 Fed. Res. Bull. 57, 58 (1986); *Citicorp*, 72 Fed. Res. Bull. 714, 716 (1986).

[25] 12 U.S.C. § 1844(b); *Citicorp*, 71 Fed. Res. Bull. at 790-91 & nn. 3-6. Indeed, subsequent to the Board's *Citicorp* order, this Court cautioned the Board that Section 5(b) "only permits the Board to police within the boundaries of the [BHC] Act; it does not permit the Board to expand its jurisdiction beyond [those] boundaries." *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373 n.6 (1986).

[26] 71 Fed. Res. Bull. at 791 & n.6. *See also NCNB Corp.*, 72 Fed. Res. Bull. at 58 & n.11.

CONCLUSION

There being no important issues of federal law to decide, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.[27]

Respectfully submitted,

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[27] The arguments set forth in this brief are supported by the Independent Bankers Association of America and the National Council of Savings Institutions.

APPENDICES

APPENDIX I

STATE AUTHORIZATION OF SELECTED EXPANDED ACTIVITIES FOR STATE-CHARTERED BANKS *

(March 1990)

Insurance Underwriting

Delaware [1]
North Carolina
South Carolina
South Dakota
Utah [1]

Insurance Brokerage

Alabama
California
Indiana [8]
Iowa [9]
Nebraska
New Jersey
North Carolina
Oregon
South Carolina
South Dakota
Wisconsin
Wyoming

Real Estate Equity Participation

Arizona
Arkansas
California
Colorado
Connecticut
Florida
Kentucky
Maine
Massachusetts
Missouri
Nevada
New Hampshire
New Jersey
North Carolina
Ohio
Rhode Island
South Dakota
Tennessee [2]
Utah
Virginia
Washington
West Virginia
Wisconsin [3]

Real Estate Development

Arizona
Arkansas
California
Colorado
Connecticut
Florida
Kentucky
Maine
Massachusetts
Michigan
Missouri
Nevada
New Hampshire
New Jersey
North Carolina
Ohio
Rhode Island
South Dakota
Utah
Virginia
Washington
West Virginia
Wisconsin [3]

Real Estate Brokerage

Iowa
Massachusetts
New Jersey
North Carolina
Oregon
Wisconsin

Securities Underwriting

Arizona
California [6]
Delaware
Florida
Indiana [5]
Iowa
Kansas [10]
Maine
Massachusetts
Michigan
Missouri [4]
Montana [7]
New Jersey
North Carolina
Pennsylvania [11]
Washington
West Virginia

Securities Brokerage

Arizona
Connecticut
Delaware
Florida
Georgia
Indiana [5]
Iowa
Kansas
Maine
Maryland
Michigan
Minnesota
Nebraska
New Jersey
New York
North Carolina
Ohio
Pennsylvania
Texas
Vermont
West Virginia

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* Expanded activities above those permitted national banks and bank holding companies under the Bank Holding Company Act.

[1] Grandfathered institutions.

[2] Banks not allowed to be active partners in real estate development.

[3] Wisconsin enacted expanded powers legislation 5.86. New legislation authorized the Commissioner of Banking to promulgate rules under which state banks may engage in activities that are authorized for other financial institutions doing business in the state.

[4] Underwrite mutual funds and may underwrite securities to the extent of the state legal loan limit.

[5] Underwrite municipal revenue bonds and market mutual funds and mortgage-backed securities.

[6] Underwrite mutual funds; law silent on other securities.

[7] Limited to bonds.

[8] Cannot broker life insurance, all other types permitted.

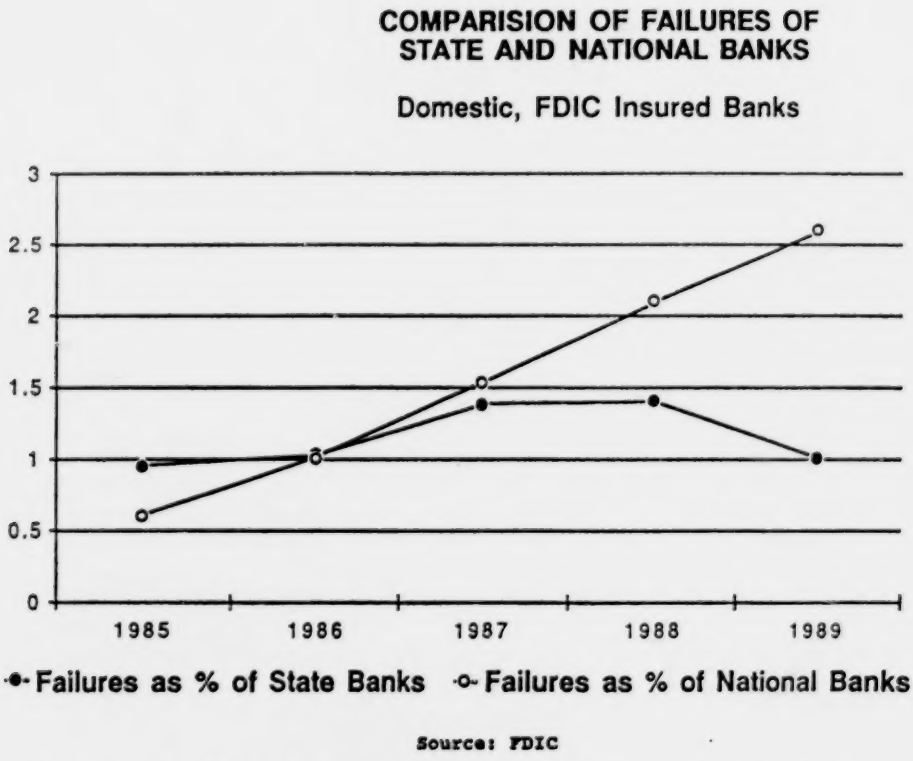
[9] Property and casualty only.

[10] Underwrite municipal bonds.

[11] Underwrite municipal and mortgage related securities to extent permitted savings banks.

Source: Conference of State Bank Supervisors, *State of the State Banking System* (1989).

APPENDIX II



Source: Conference of State Bank Supervisors, *State of the State Banking System* (1989).